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Nos. 310, 322

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In the Supreme Court of the United States

OCTOBER TERM, 1958

BOSTON AND MAINE RAILROAD, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD, ET AL., APPELLANTS

v.

BOSTON AND MAINE RAILROAD, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

These are direct appeals from the final judgment of a district court setting aside an order of the Interstate Commerce Commission entered in a proceeding initiated by a complaint filed by certain long-haul trunk-line railroads against certain short-haul termi-

nal railroads. The complaint requested the Commission to find and declare that certain *per diem* rates, established by the railroads participating in an agreement which the Commission had approved pursuant to Section 5a of the Interstate Commerce Act, constituted just and reasonable compensation to be paid as rental or *per diem* by railroads using cars owned by other railroads. The agreement provided for utilizing the services of the Association of American Railroads in establishing such charges, and that proposed increases in the *per diem* charge be submitted by letter ballot to the subscriber railroads, with each such railroad having one vote for each car owned by it.

Pursuant to this agreement and procedure, the *per diem* rate was increased in 1949, in 1952, and in 1953. Beginning with the 1949 increase, certain terminal railroads gave notice that they would no longer make settlement on the basis of rates established pursuant to the Section 5a agreement, and the trunk-line railroads subsequently instituted the complaint proceeding before the Commission. The Commission found, after lengthy hearings, that the rates established in 1949, 1952 and 1953 "were not in excess of reasonable compensation during the periods in which they were effective," and entered an order discontinuing the proceeding. The terminal railroads then filed the present action to set this aside.

The district court held that the Commission was empowered to enter a declaratory order with respect

to the reasonableness of the *per diem* charges. The opinion pointed out that Section 1 (11) of the Interstate Commerce Act imposes a duty upon the railroads to charge no more than reasonable compensation for the use of their cars by other railroads; that Section 13 (1) of the Act empowers the Commission to entertain complaints alleging excessive charges for car hire; and that Section 16 of the Act gives the Commission authority to award damages to those harmed by excessive car-hire charges. The court concluded that since the Commission has jurisdiction to award damages for past or present unreasonable charges for car hire, it has jurisdiction under Section 5 (d) of the Administrative Procedure Act to enter, in its discretion, a declaratory order with respect to the reasonableness of such charges.

On the merits, the primary ground of decision was that the Commission had erred in rejecting, "without a more thorough investigation and more detailed findings and analysis," a time-mileage method for calculating compensation urged by certain terminal railroads as more equitable than the *per diem* method approved by the Commission. The court also questioned the Commission's use of certain factors in determining the car-hire rate. The court accordingly remanded the matter to the Commission for further proceedings not inconsistent with the opinion.

In a dissenting opinion, District Judge McCarthy concluded that "the Commission was without jurisdic-

tion to enter the order in question," and stated that he would vacate the order on that ground.

We believe that the majority decision, insofar as it held that the Commission was acting within its jurisdiction in issuing a declaratory order, is correct. The statutory basis for issuing such order is set forth in the majority opinion. We would emphasize further that if the creditor carriers were to sue the debtor carriers in the appropriate district courts to collect their charges, the issue of the reasonableness of those charges would be referable as of course to the Commission. *United States* v. *Western Pacific Railroad Co.*, 352 U. S. 59. It is indisputable that there is at present a live and a general controversy as to the reasonableness of *per diem* charges, and there is no sound reason, we submit, why the Commission should not determine that issue in advance of piecemeal litigation.

The question whether the Commission should have been required by the district court to conduct further investigation and make more detailed findings does not, in our opinion, require review. The Commission is prepared to proceed in accordance with the terms of the remand. Accordingly, the district court's decision is in the nature of an interim ruling.

We suggest, in the light of these considerations, that the appeals do not present any substantial ques-

tion requiring determination at this time and that the Court should decline to note probable jurisdiction.[1]

Respectfully submitted,

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[1] The Commission does not concede that its order on the merits was erroneous and, in the event that probable jurisdiction should be noted, it reserves the right to argue that question.

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